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JUN 14 1974
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. A - 1071

GEORGE O. PARKER

VS.

JOHN J. McKEITHEN,
GOVERNOR OF LOUISIANA, et al

PETITION FOR WRIT OF CERTIORARI
TO REVIEW THE DECISION OF THE UNITED STATES
COURT OF APPEALS FIFTH CIRCUIT

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George O. Parker, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered January 24, 1974, rehearing denied on February 15, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section F, printed in Appendix C hereto, previously reported at 330 F. Supp. 435. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix B hereto, is reported at 488 F.2d 553. The order of the United States Court of Appeals, Fifth Circuit, denying the application for rehearing, printed in Appendix A hereto, was not reported.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

(1) If an appellate court vacates a prior summary judgment rendered by a District Court pursuant to Rule 56 of the Federal Rules of Civil Procedure, then can that same appellate court in the same judgment ex proprio motu substitute its own motion and judgment directing the lower court to enter a new and different summary judgment pursuant to Rule 56 the F.R.C.P. on "other independent grounds"?

(2) When no motion of dismissal based on collateral estoppel had heretofore been filed in the lower District Court, when further no decision or judgment concerning collateral estoppel had been rendered by the lower District Court and when no appeal pertaining to collateral estoppel was pending before the appellate court, does that appellate court pursuant to its grant of jurisdiction, 28 USC 1291, have authority to ex proprio motu order a summary judgment against appellant pertaining to collateral estoppel?

(3) Does due process guaranteed by the Fourteenth Amendment of the United States Constitution demand at the very least that an appellant be given benefit of notice, opportunity to respond and also opportunity for hearing prior to having a cause dismissed upon "other independent ground re collateral estoppel", as herein ordered and directed by the Fifth Circuit, Court of Appeals to the United States District Court?

(4) Does a State Court suit filed in tort, tried in tort and adjudged in tort, pursuant to Louisiana'a Civil Code Article 2315 preclude a separate and different federal claim between the same and other parties concerning Civil Rights pursuant to 42 USCA 1981, et seq., as a matter of law?

STATUTES INVOLVED

UNITED STATES CONSTITUTION:

Article IV
Eighth Amendment
Fourteenth Amendment

RULES OF APPELLATE PROCEDURE (R.A.P.):

Rule 3(a)
Rule 4
Rule 10(a)

FEDERAL RULES OF CIVIL PROCEDURE (F.R.C.P.):

Rule 56
Rule 12

FEDERAL STATUTES:

28 USC-1291
42 USCA-1981, et seq.
28 USCA 1738

LOUISIANA STATUTES:

LSA-CC-2315, Louisiana Tort Article
LSA-R.S. 22:655, Louisiana Direct Action Statute

STATEMENT OF THE CASE

1. Preliminary Facts.

On or about September 15, 1969, George O. Parker, a black inmate, confined to the downstairs medium security section of Camp "H" of the Louisiana State Penitentiary, at Angola, Louisiana, was brutally stabbed three times between the abdomen and the neck by another black inmate prisoner named Willie Edmondson. At the time of the stabbing incident, George O. Parker was in his bunk, asleep. Prior to this attack upon George O. Parker, Willie Edmondson had a history of serious violent attacks upon other inmates. Notwithstanding, George O. Parker requested a transfer out of Camp because of his fear of Willie Edmondson. The attack on George O. Parker took place approximately 4:45 A.M., when Willie Edmondson used a knife with a 16 inch blade. Edmondson, who lived in the upstairs section of Camp "H", came downstairs from his living area, through a door, to the outside left unlocked, entered the downstairs living area of that same barrack, sought out Parker and stabbed him three times, inflicting grave injuries.

Six days after the stabbing, on September 21, 1969, the penitentiary fully processed papers which should have released George O. Parker from all police custody. His order for release was based on good time behavior as provided by Act 426 of the 1964 Louisiana Legislature. However, notwithstanding the order for his release, George O. Parker remained a prisoner in the prisoner section of the hospital, under constant guard, deprived of all freedom.

2. The Proceeding Before The U. S. District Court and the United States Court of Appeals.

Procedure in the U. S. District Court, Civil Action 70-2612 and the U. S. Fifth Circuit, Court of Appeals, Action Number 71-2499 was as follows:

The original complaint filed in the Federal Court pursuant to the Civil Rights Act, 42 USC 1981, et seq. urged the cause of action to the effect that: (1) the officials were aware of dangerous conditions existing at Angola, including the wide spread making and use of knives and other weapons; (2) that prison officials were aware that Edmonson, in particular, was a violent person with a record of prior attacks on fellow inmates; (3) that prison officials were aware that Edmonson made specific threats against Parker prior to the date of the attack; (4) that prison officials refused to isolate Parker from Edmonson and other inmates but permitted him to remain in an open type dormitory.

The defendants heretofore moved for summary judgment alleging that no substantial federal claim had been presented on the face of the pleadings. After a hearing on the motion, a summary judgment was granted as to all defendants on July 4, 1971. (See Appendix C which district court opinion is reported at 330 F.Supp. 435.)

From that adverse summary judgment, George O. Parker filed an appeal and on January 24, 1974, the United States Court of Appeals for the Fifth Circuit rendered the opinion contained in Appendix B, and reported at 488 F.2d 553. In this unique opinion, the United States Court of Appeals for the Fifth Circuit vacated the summary judgment heretofore entered, rejecting all reasons for the

summary judgment, as urged previously by the lower district court, but nevertheless remanded the case back to the lower court, instructing and directing this lower court to enter a summary judgment for new and independent reason based on "collateral estoppel".

Thereafter, on January 31, 1974, George O. Parker filed a petition for rehearing which was denied on February 15, 1974. Thereafter, on May 8, 1974, by order signed by the Honorable Louis F. Powell, George O. Parker was granted an extension of time until June 14, 1974, in which to file a petition for writ certiorari.

3. Prior State Proceedings.

George O. Parker has heretofore appeared before the United States Supreme Court in a petition for a writ of certiorari to review the judgment on rehearing rendered by the Louisiana Supreme Court, August 20, 1973, in a 4 to 3 decision adverse to George O. Parker. Unfortunately, the petition for writ of certiorari pertaining to the state court proceeding was denied by the United States Supreme Court on December 10, 1973.

In these prior state proceedings John J. McKeithen, C. C. Aycock and John S. Garrett did not appear as a defendant, at anytime. The same is true concerning Willie Edmonson.

REASONS FOR GRANTING THE WRIT

George O. Parker is now a derelict, having been made so, as a result of an obsolete prison system, which obsolescence will undoubtedly outlive this prisoner. George O. Parker, individually, and the horror he has sustained may be no reason to grant a writ, but George O. Parker, as a representative of

a overwhelming multitude of prisoners, who are imprisoned day by day at their peril and to the eventual peril of society, is adequate reason to grant a writ.

There is something lacking in the American prison system. It will not improve by not looking at it. The plight of George O. Parker is grim and unsightly, but unfortunately it is common. Worst, his history as partially revealed in court records, illustrate too vividly why too many prisoners leave prisons more inclined to crime than when they entered.

George O. Parker was a criminal and a homosexual. Does that mean he is without rights as too many of the decisions heretofore rendered have indicated? Does that mean that George O. Parker, and prisoners like him, have lost all civil rights? Have they no standing in court to seek any remedy for any wrongs committed upon them?

ARGUMENT ON QUESTIONS PRESENTED

(1) If an appellate court vacates a prior summary judgment rendered by a District Court pursuant to Rule 56 of the Federal Rules of Civil Procedure, then can that same appellate court in the same judgment ex proprio motu substitute its own motion and judgment directing the lower court to enter a new and different summary judgment pursuant to Rule 56 the F.R.C.P. on "other independent grounds"?

The procedure followed by the district court below, as evidenced in 330 F.Supp. 435, was erroneous on its face: Assume the validity of the motion of the defendants below to the effect that "no substantial federal claim had been presented in the federal pleadings",

there was obviously on its face, no basis to render a judgment to the effect there was "no material fact at issue" between the plaintiff and the defendants, so that on its face, the judgment should not have been rendered pursuant to Rule 56. The proceedings below were erroneous and accordingly, the judgment of the United States District Court of Appeals, as evidenced by the January 24, 1974 opinion, is correct in vacating that judgment. However, the erroneous judgment from the district court below coupled with the setting aside of the judgment by the United States Court of Appeals does not justify the new added judgment or the direction of the United States Court of Appeals to enter a different summary judgment on "new and independent grounds", pertaining to "collateral estoppel".

The defendants have heretofore never filed any motion, notice, memorandum or statement of facts, as required by the United States District Court local Rule 4 and/or the requirements of Rule 12 of the F.R.C.P. pertaining to "collateral estoppel". The actions of the United States Court of Appeals for the Fifth Circuit directing the district court below to enter a summary judgment on the "new and independent grounds" was violative of the specific provisions of Rule 56 of the F.R.C.P. The ex proprio motu directive of the Fifth Circuit Court of Appeals to the U.S. District Court below denied George O. Parker the provisions of Rule 56(c) which specifically provides:

> "...The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the delay of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if pleadings, depositions,

answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact ..."

There is no provisions in the Federal Rules of Civil Procedure or the Rules of Appellate Procedure which give authority to an appellate court to deny a litigant his rights as provided by Rule 56 of the F.R.C.P.

The absence of opportunity for George O. Parker to respond to the ex proprio motu directive of the Fifth Circuit Court of Appeals is violative of the due process clause of the Fourteenth Amendment for the United States Constitution.

In evaluating the ex proprio motu directive of the appellate court pertaining to "collateral estoppel" it must be kept in mind that this hurried decision came about, notwithstanding that John J. McKeithen, C. C. Aycock and John S. Garrett were not sued individually in the state court proceedings but were only sued individually in federal court proceedings. Any type of application of "collateral estoppel" pertaining to Messrs. McKeithen, Aycock and Garrett is erroneous and apparently the rule was made for this special occasion. Mere attempt to employ "collateral estoppel" as to these three men reveals in nakedness, the sad plight of this litigant, George O. Parker, attempting to seek redress.

Then there is Willie Edmonson, the culprit, who stabbed Parker, while Parker was sleeping. He was not sued in any manner in the state court proceedings; however, in federal court proceedings Hartford A. & I. was sued as the insurer of Willie Edmonson. The

January 24, 1974 decision of the appellate court also includes Hartford A. & I. as a beneficiary of the ex proprio motu directive of the United States Court of Appeals for the Fifth Circuit.

> (2) When no motion of dismissal based on collateral estoppel had heretofore been filed in the lower District Court, when further no decision or judgment concerning collateral estoppel had been rendered by the lower District Court and when no appeal pertaining to collateral estoppel was pending before the appellate court, does that appellate court pursuant to its grant of jurisdiction, 28 USC 1291, have authority to ex proprio motu order a summary judgment against appellant pertaining to collateral estoppel?

Pursuant to Rule 12 of the F.R.C.P. it is the prerogative of the litigant to file motion, seeking summary judgment under Rule 56 of the F.R.C.P. Specifically, Rule 56 grants the right to a party in litigation to seek a summary judgment, not a district court nor an appellate court. In the instant case no party sought a summary judgment pursuant to Rule 56 on the "independent grounds of collateral estoppel". Initiating action came with the January 24, 1974 opinion of the Fifth Circuit Court of Appeals. Prior to this same appellate opinion, no district court had rendered any judgment pertaining to "collateral estoppel". When the Fifth Circuit Court of Appeals in its January 24, 1974 opinion directed the District Court below to enter a summary judgment on "other independent grounds" its action was without the jurisdiction granted by 28 USC 1291. In pertinent part 28 USC 1291 provides:

"1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...except where a direct review may be had in the Supreme Court."

This grant of jurisdiction is appellate in nature and only "from all final decisions of the district courts". There is no provision in 28 USC 1291 for an appellate court to institute, instigate and/or direct ex proprio motu a judgment not heretofore adjudged.

Likewise, there is no provisions in Rules of Appellate Procedure that justifies an ex proprio motu directive for a judgment, not heretofore noticed for appeal. Rule 3(a) of the R.A.P. provides in pertinent part:

"(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4."

In the instant case none of the appellees have heretofore filed any notice of appeal to any aspect of the case. The only appeal filed herein was that of the appellant, George O. Parker.

Not heretofore considered by the Fifth Circuit Court of Appeals, when rendering their January 24, 1974 opinion is the specific provisions of Rule 10(a), which specifically provides:

"(a) Composition of the Record of Appeal. The original papers exhibits

> filed in the district court, the transcript of proceedings, if any, and a certified a copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases."

If this Rule 10(a) is restrictive, and not merely suggestive, then the record of the appeal in the instant case on and prior to January 24, 1974, contain no evidence, whatsoever, that would lend itself to any type of judgment pertaining to any aspect of "collateral estoppel". Neither the order of the United States Supreme Court in Parker v. Louisiana, No. 73-597, rendered on December 10, 1973 nor the opinion of the Louisiana Supreme Court for George O. Parker v. the State of Louisiana, et al, reported at 261 Southern Reporter 2d 364 and 230 were part of the record of appeal in the Fifth Circuit case 71-2499.

The January 24, 1974 ex proprio motu directive of the Fifth Circuit Court of Appeals was violative of the provisions of Rule 27 (a) of the R.A.P. Rule 27 in pertinent part provides:

> "(a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, on application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with

> the motion. Any party may file a response in opposition to a motion other than one for a procedural order ..."

No motion or other type papers were filed by any party either in the appellate court or the lower district court seeking any type of relief as indicated in the January 24, 1974 directive of the Fifth Circuit Court of Appeals, directing the lower court to enter a summary judgment on "other independent grounds".

As such, it is completely inappropriate for the Fifth Circuit Court of Appeals, in the instant case, to rule:

> "Since summary judgment is now a proper disposition, we vacate the original judgment below and remand for the entry of summary judgment upon new and independent grounds." (Emphasis ours.)

None of the multiple appellees nor the district court below heretofore sought a summary judgment upon new and independent grounds. This was an ex proprio motu action by the Fifth Circuit Court of Appeals, not authorized in any of the Rules of Appellate Procedure or its grant of authority in 28 USC 1291 or 28 USC 1292.

And since John J. McKeithen, C. C. Aycock and John S. Garrett were never defendants in state court proceedings application of "dismissal based on collateral estoppel" is grossly inappropriate.

(3) Does due process guaranteed by the Fourteenth Amendment of the United States Constitution demand at the very least that an appellant be given benefit of notice, opportunity to respond and also opportunity for hearing prior to having a cause dismissed upon "other independent grounds re collateral estoppel", as herein ordered and directed by the Fifth Circuit, Court of Appeals to the United States District Court?

The original judgment rendered by the Honorable Lansing L. Mitchell, at 330 F.Supp. 435, does not contain any judgment rendered or not rendered upon "new and independent grounds". Moreover, at this point, it is appropriate to quote the pertinent parts of the brief of the appellees heretofore filed with the United States Court of Appeals prior to the January 24, 1974 opinion. The appellees' brief, with reference to the "statement of the case" specifically advised the following:

"II. STATEMENT OF THE CASE

The suit herein is merely one for damages arising from the allegedly tortious acts of the named defendants which allegedly have caused the injuries. A similar suit was filed in the state court against the State of Louisiana and was previously submitted into the record. This appeal is from the grant of a motion for summary judgment by the defendants based on the position that the federal courts should not entertain such a suit where mere passive conduct is alleged to have caused the injuries. The minute chronological sequence of the progress of the various pleadings

and rulings set forth in brief of appellant will not be repeated. Suffice it to say that the net result of the proceedings in the lower court has been to dismiss the action as to each and every named defendant, based however on slightly different legal principles as to each.

Defendants-appellees submit that it is impossible to submit a statement of facts as none have been introduced in or stipulated to in the record. (Emphasis ours.) We are left merely with the allegations of the complaint which appellant has liberally referred to as established as facts. The situation charged as setting forth a claim cognizable under the Civil Rights Act is that the plaintiff, George O. Parker, was stabbed viciously and without provocation by a co-inmate, one Willie Edmundson. There is no direct involvement of any of the named defendants in the injury itself. The culpability, if at all, is charged as being the failure of the defendants, singularly and collectively, to adequately protect the plaintiff, George O. Parker, from the attacks by Willie Edmundson when they knew or should have known a dangerous situation existed. For purposes of the motion for summary judgment, however, the defendants have conceded that there is no genuine issue as to any of the facts presented but simply urge that under the facts as alleged, they are entitled to a judgment of dismissal as a matter of law. (Emphasis ours.)"

Considering the underscored portion of the appellees brief to the Fifth Circuit Court

of Appeals regarding the statement of the case, it represented a gross departue from the record submitted on appeal pursuant to Rule 10 (a) of the R.A.P. and the statement of the case as submitted by the appellee for the Fifth Circuit Court of Appeals to direct the district court to enter a judgment ex proprio motu upon "other independent grounds". The collateral estoppel alluded in the January 24, 1974 opinion of the appellate court is without and foreign to the record of the case made before the Fifth Circuit Court of Appeals pursuant Rule 10(a) of the R.A.P.

Under the Fourteenth Amendment of the United States Constitution, George O. Parker has not afforded equal protection of the laws. In arriving at the ex proprio motu directive to the U. S. District Court, instructing that district court to dismiss all claims pursuant to the doctrine of "collateral estoppel" all procedure pursuant to the Federal Rule of Civil Procedure and the Rules of Appellate Procedure were ignored.

As indicated in the appellate decision, 488 F.2d 553, also in Appendix B, the Fifth Circuit Court of Appeals indicated it recognized the right of George O. Parker under the Eighth Amendment to be free from cruel and unusual punishment and made further reference to the due process clause of the Fourteenth Amendment as decided by Robinson v. California, 1962, 370 U. S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758, which cited dictum from an earlier Supreme Court case originating in the courts of Louisiana, State of Louisiana ex rel. Frances v. Resweber, 1947 329 U.S. 459, 463, 67 S.Ct. 374, 376, 91 L.Ed.422, 426. But thereafter, the Fifth Circuit Court of Appeals departed from due process:

In footnote (3) of the January 24, 1974 opinion, the Fifth Circuit Court of Appeals acknowledged the sparsity of facts before that appellate court:

> "Footnote 3. The district court's opinion and the appelate briefs contain only sparse factual recitals. For this reason we have relied in part upon the Stipulation of Facts cited by the Louisiana Court of Appeals in Parker v. State, La. App. 1972, 261 So.2d 364, 366-367, aff'd, La. 1973, 282 So.2d 483, petition for cert. denied, ____U.S. _____, 94 S.Ct. _____, 38 L.Ed.2d _____ (1973), a suit arising out of the same injury as the instant suit filed in the state district court on July 20, 1970, some two months prior to the filing of suit in the court below."

The sparsity of facts before them did not dissuade the Fifth Circuit Court of Appeals from making the ex proprio motu directive pertaining to "collateral estoppel". Nor did the specific fact that all of the defendants sued in the federal court suit were not likewise, defendants in the state court suit dissuade the appellate court below from making a directive ex proprio motu pertaining to a summary judgment.

Pretermitting Federal Rules of Civil Procedure and Rules of Appellate Procedure were ignored when the appellate court gave a directive ex proprio motu to the district court concerning a summary judgment pursuant to the F.R.C.P., Rule 56 based on "collateral estoppel", it remains a most conspicuous error that John J. McKeithen, C. C. Aycock, John S. Garrett and Hartford A. & I., as the insurer of

Willie Edmonson, should in anywise be considered as beneficiaries of a directive to the U. S. District Court concerning "collateral estoppel". John J. McKeithen,C. C. Aycock and John S. Garrett were not sued individually, in the state court proceedings. The U.S. Supreme Court file of Parker v. Louisiana, numbered 73-597, will reveal the following:

(a) The State of Louisiana was sued as a defendant in the state court proceeding, and Governor John J. McKeithen was served as an agent for service of process for the State of Louisiana, but not individually.

(b) C. C. Aycock and John S. Garrett were not named or served with any papers.

(c) Hartford A. & I. Company was sued pursuant to LSA-R.S. 22:655, but not in the capacity of a insurer of Willie Edmonson.

George O. Parker has filed suit in federal court under Title 42 USC Sections 1981, et seq.

George O. Parker has been denied due process. We are reminded of the quote of Justice Matthews, speaking for the Court in Hurtado v. California, 110 U.S. 516 (1884):

> "...arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential

to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and mininorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

(4) Does a State Court suit filed in tort, tried in tort and adjudged in tort, pursuant to Louisiana's Civil Code Article 2315 preclude a separate and different federal claim between the same and other parties concerning Civil Rights pursuant to 42 USCA 1981, et seq., as a matter of law?

In the 19th Judicial District Court for the Parish of East Baton Rouge, for the State of Louisiana, George O. Parker sued the State of Louisiana, the Department of Corrections, Louis M. Sowers, C. Murray Henderson, Lloyd W. Hoyle, Hayden J. Dees and Fireman's Fund Insurance Company and Hartford Accident and Indemnity Company. Hartford A. & I. was sued as the insurer of Louis M. Sowers, Hayden J. Dees and Lloyd W. Hoyle. On the other hand, in the federal court suit, George O. Parker sued John J. McKeithen, individually, together with C. C. Aycock, John S. Garrett, the State of Louisiana, Louis M. Sowers, C. Murray Henderson, Lloyd W. Hoyle, Hayden J. Dees and Fireman's Fund Insurance Company, as the insurer of C. Murray Henderson and Willie Edmonson. The defendants in the State Court proceedings are not identical with the defendants in the Federal Court proceedings.

In this respect, we should review the state court proceedings as the same are contained in the U. S. Supreme Court file number 73-597:

On July 29, 1971, Judge Shortess, State Court trial judge, said in pertinent part:

> "In order to find that the State of Louisiana through its Department of Corrections was guilty of negligence in this case plaintiff must satisfy the test laid down in St. Julian vs State of Louisiana, 98 So. 2d 284.
>
> > 'The general rule gathered from the cases is that in order to hold the State or the employees of the State who have charge of a prison liable for injury to one inmate inflicted by another inmate, there must be knowledge on the part of such officers in charge that such injuries will be inflicted by another inflicted or good reason to anticipate such and following that, there must be showing of negligence on the part of these prison officials in failing to prevent the injury.'"

The holding has its peculiarities: "Knowledge" is said to be an essential test. But in the opinion "the theory of knowledge" is placed on an anvil and beaten into a shape that no Epistemologist would recognize.

Sargeant Milton Davis had testified that Parker came to him and asked to be transferred because he was afraid of Edmonson. Captain Couvillion testified that Parker told him that he had difficulties with Edmonson. But in deference to the political defendants, the

19th Judicial District Court concluded that this was not "knowledge".

Sgt. Davis also called Edmonson to the office and made the wrong evaluation that Edmonson was not belligerent. Capt. Couvillion also made this wrong evaluation. The records of the prison, as stipulated, indicated otherwise. Moreover, it was reported in the opinion of the District Court:

> "The stipulations of counsel together with Edmonson's prison file leave no doubt in the Court's mind that he was anything but a model prisoner. He very definitely had the propensity to inflict grave bodily injury on his fellow inmates."

Notwithstanding the foregoing recognition, Judge Melvin A. Shortess, with a type of logic similar to his Epistemology concluded:

> "The Court concludes that there was no sufficient evidence presented to the Court that prison officials knew or should have known that Parker was to be stabbed by Edmonson. Accordingly, plaintiff's demands must fall and his suit is dismissed at his cost."

The majority opinion of the First Circuit Court of Appeals for the State of Louisiana is yet a better example of how to avoid the problem, not looking at it, hoping that it will all go away. The First Circuit Court of Appeals for the State of Louisiana's argument to prove contributory negligence on the part of George O. Parker is a masterpiece of evasiveness. The majority opinion concludes:

"Assuming, argumendo, that negligence should be assigned to those in charge for not transferring plaintiff, we think it is clear that plaintiff would still be unsuccessful in the prosecution of this particular phase of his case, as we find that he would be contributorily negligent under the circumstances prevailing. Sgt. Davis, a Camp H correctional officer at the time of this incident, positively testified that the plaintiff could have forced his own removal by refusing to go to work or by stepping out of line and refusing to come back into the compound yard at the end of a day's work. Either of these actions would have automatically forced his removal to a more secure lock-up area. Sgt. Davis' testimony also leads to the conclusion that if the plaintiff had really felt that an attach was imminent, some affirmative action or protest on his part could have insured his removal. At page 320 of the transcript, we find this colloquy:

'Q Did Parker ever make such a move in your shift?

A Not that I know of, not when I was on duty.

Q Did he ever make such a refusal to work?

A No, sir.

Q What you're saying, I think is, had he been in fear of his life, he could have taken some steps to get himself out of there?

A He could have.'

Not having done so, the plaintiff was guilty of contributory negligence sufficient to bar his recovery herein based on the failure to transfer either he or Edmonson from Camp H."

Even under judicial proceedings, George O. Parker has systematically been denied equal protection under the Eighth and Fourteenth Amendments of the United States Constitution, thus the dissenting opinion of Judge Blanche has special significance:

"BLANCHE, J., DISSENTING

I respectfully dissent.

Both the trial court and the majority have committed manifest error in failing to conclude that plaintiff established constructive knowledge that he was likely to be injured by another inmate as required by St. Julian v. State, 98 So.2d 284 (La.App. 1st Cir. 1957). The majority acknowledges that from the stipulations alone the dangerous propensities of Edmonson were well known and plaintiff had good reason to be afraid of him. The opinion states:

'***Edmonson has compiled a record while in Angola which reasonably demonstrates that he is a dangerous person who is a menace not only to society at large, but to those immediately around him. Stabbings and other acts of violence seem to be commonplace with him.'(p.5)

The opinion further states:

'The plaintiff, without doubt, had a genuine fear for his personal safety; that fear was of Willie Edmonson, and it was reported by him to several guards and to administrative personnel at Camp H on numerous occasions.' (p.5)

It is not mitigating circumstances to me that he was no worse than many other inmates at Camp H and that worse prisoners than he were confined there in medium security when all the circumstances of the case are taken into account. ...I do not find it an acceptable excuse for not moving plaintiff and his assailant away from each other that there were only 341 single cells in the whole prison and a prison population of some 3,700. The majority stated:

'Bearing on the question of failure to transfer and thus separate the plaintiff and Edmonson is the nature of those confined to Camp H and the inadequacy of facilities at Angola.' (p.9)

It is unthinkable that the inadequacy of prison facilities and the shortage of personnel could absolve the state from liability of the kind here asserted. The State is responsible for the safety of prisoners, and the highest degree of care is called for when it is taken into consideration the nature of persons so confined and that those so confined are deprived of their normal power of self-protection.

> As custodian of plaintiff's person and responsible for his safety, the plaintiff has shown and the defendant had admitted the inadequacy of its facilities and personnel to fulfill this duty."

The Louisiana Supreme Court, in the majority opinion, rejected the First Circuit Court of Appeals' theory of contributory negligence, and decided the case with other preference, which are unique:

(a) The open door allowing Edmonson to come from one level to another level could not be considered an item of fault inasmuch that the purpose of the door was to prevent prisoners inside escaping outside; since Edmonson moved from outside to inside, there obviously was no fault;

(b) Likewise, the acquisition and possession of Edmonson with a 16 inch blade knife was no fault because lots of prisoners had knives;

(c) The administrative decision against isolation of either Parker or Edmonson was also without fault, because only hindsight tells us that the decision was wrong.

Two Justices dissented to the majority opinion and the written dissent of Justice Tate is significant:

> "I agree with the excellent dissent of Judge Blanche in the court of appeal. 261 So.2d 364, 374. As he there stated, 261 So.2d 372:

> 'It is unthinkable that the inadequacy of prison facilities and the shortage of personnel could absolve the State from liability of the kind here asserted. The State is responsible for the safety of prisoners, and the highest degree of care is called for when it is taken into consideration the nature of persons so confined and that those so confined are deprived of their normal power of self-protection. As custodian of plaintiff's person and responsible for his safety, the plaintiff has shown and the defendant has admitted the inadequacy of its facilities and personnel to fulfill this duty. Accordingly, the failure to provide adequate facilities and personnel to prevent prisoners from obtaining and possessing dangerous weapons or controlling their activities with adequate personnel to prevent injuries such as here sued upon is, in my opinion, actionable negligence. Such a holding would not make the State the insurer of prison inmates but would require it to exercise due care to protect prisoners in its custody from sexual or other physical assaults and especially while sleeping.'"

The case of George O. Parker has been a disturbing case. It appeared again in the state court proceedings for a rehearing. On rehearing, Justice Marcus avoided the facts and the law and came forth with an opinion satisfactory to the political defendants. In the petition for a rehearing, before the

Louisiana Supreme Court, Justice Tate, Justice Barham and Justice Dixon dissented.

Thereafter, a petition for a writ of certiorari was filed with the Supreme Court of the United States and on December 10, 1973 the Supreme Court of the United States denied this petition in case number 73-597.

George O. Parker, now seeks remedy in federal court as indicated in this petition for a writ of certiorari:

In dismissing the cause of George O. Parker against all defendants, the United States District Court in Civil Action 70-2612 adopted the urgings of the defendants to the effect: (a) Parker failed to state a claim because he alleged only "an isolated incident of negligence failure to protect; (b) federal court should take a "hands off policy" towards matters of State Prison Administration.

With reference to the opinion of the United States District Court, reported at 330 F.Supp. 435, and Appendix C, the Fifth Circuit Court of Appeals in its January 24, 1974 opinion rejected and vacated the dismissal via summary judgment by the district court, and thereafter substituted ex proprio motu its own directive to the district court to enter a summary judgment upon different independent grounds pertaining to "collateral estoppel".

In footnote 7 of the January 24, 1974 opinion of the U. S. Court of Appeals for the Fifth Circuit, it was stated in pertinent part:

"7. In applying the doctrine of collateral estoppel by judgment in

this case, we are not unmindful of the unsettled nature of the law regarding the respect to be accorded state court rulings in subsequent federal court proceedings. See Vestol, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich. Law Review 1723, 1934 N. L. 45 and accompanying text. In particular there appears to exist some difference of opinion whether state court decisions are to accorded force in the federal courts under the doctrine of collateral estoppel by judgment or under the provisions of Title 28 U.S.C. Section 1738, an expansion of the 'Full Faith and Credit' provision of Article IV of the United States Constitution. Section 1738 states:

> Such Acts, records and judicial proceedings or copies thereof (referring to the States) so authenticated, shall have the same full faith and credit every court within the United States and its Territorities and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

We intimate no opinion as to the relative merits of one ground over the other, but rely on the doctrine of collateral estoppel because prior precedent in this circuit approves the doctrine. Hyman v. Regenstein, 5 Circuit 1958, 258 F.2d 502.

> At the same time we note the existence of a distinction between the factual situation in the instant case and that in Hyman v. Regenstein. Hyman concerns the effect to be given the decision of a Colorado state court by a Florida federal district court. We are concerned here with the effect to be accorded by a federal district court sitting in Louisiana to decisions of the courts of the State of Louisiana. No reason or rule of policy exists to our knowledge why the rule applied in Regenstein to out-of-state judgments should not apply with equal force to in-state judgments, and we proceed upon that basis."

In response to footnote 7 of the Fifth Circuit's opinion, the petitioner, George O. Parker, urges the following:

(a) In the instant case John J. McKeithen, C. C. Aycock, John S. Garrett and Hartford A. & I., as the insurer of Willie Edmonson, were not heretofore defendants in the 19th Judicial District Court, Suit No. 143-418, which was the subject of state court appellate review.

(b) In Hyman v. Regenstein, 5 Cir. 1958, 258 F.2d 502, and Hyman v. Continental Illinois National Bank, 1959, 359 U.S. 913, 79 S. Ct. 589, 3 L.Ed.2d 575, there is no abandonment by the courts of the provisions of Rule 56 of the Federal Rules of Civil Procedure.

(c) In neither Hyman v. Regenstein, supra, or Hyman v. Continental Illinois National Bank, supra, there is no ex proprio motu procedure by an appellate court, denying the adverse parties opportunity to present contradictory evidence.

(d) While it is a true principle of law that "a fact decided in an earlier suit is conclusively established between parties and their privies, provided it was necessary to the result in the first suit" it does not follow that opinions of fact, arbitrarily adopted by other courts are the same "facts conclusively established between parties".

George O. Parker submits, reurges and reiterates all seventeen (17) stipulations heretofore stipulated in state court together with the testimony of Claude J. Gunnells, Jr., Richard Ducote, Richard Knox, Capt. Albert Couvillion, Robert G. Bryan, Milton Davis, Jr., Lemuel Rudolph Lockett and even the culprit, Willie Edmonson. The stipulated facts, the recorded facts and the recorded testimony should be facts conclusively established between the parties. But does that mean distorted opinions of these facts are "conclusively established"? We think not. We further submit that for a federal court to do so, is to deprive a litigant of due process and the rights guaranteed him under the Eighth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the foregoing reasons, the petitioner, George O. Parker, urges the United States Supreme Court to grant to the petitioner a writ of certiorari, to review the decision of the United States Court of Appeals, as reported at 488 F.2d 553, which vacated a lower court decision at the same time it remanded the case with ex proprio motu instructions to enter a summary judgment against George O. Parker based on the doctrine of "collateral estoppel". George O. Parker urges that the petition for writ of certiorari be granted or in the alternative that the United States Supreme Court, vacate that part of the United States Court of Appeals for the Fifth Circuit's judgment "remanding the case to the district court to enter a summary judgment upon new and independent grounds".

Respectfully submitted,

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BY: _____

CHARLES R. MALONEY

PROOF OF SERVICE

I, CHARLES R. MALONEY, an Attorney for the petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 11th day of June, 1974, I served copies of the foregoing petition for writ of certiorari upon Mr. William Guste, Attorney General of Louisiana, Capitol Station, P. O. Box 44005, Baton Rouge, Louisiana 70804, by mailing a copy thereof, postage prepaid.

Dated this 11th day of June, 1974.

CHARLES R. MALONEY

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 71-2499

U. S. COURT OF APPEALS
FILED
FEB 15 1974
EDWARD W. WADSWORTH
CLERK

GEORGE O. PARKER,

Plaintiff-Appellant,

versus

JOHN J. McKEITHEN, Governor of the State of Louisiana, et al,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(February 15, 1974)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

INDEXED

George O. PARKER, Plaintiff-Appellant,

v.

John J. McKEITHEN, Governor of the State of Louisiana, et al., Defendants-Appellees.

No. 71-2499.

United States Court of Appeals, Fifth Circuit.

Jan. 24, 1974.

Action under Civil Rights Act by state prisoner against governor and other state officials and state prison officials for injuries sustained when the prisoner was attacked by a fellow inmate. The United States District Court for the Eastern District of Louisiana, 330 F.Supp. 435, Lansing L. Mitchell, J., entered judgment for the defendants, and the prisoner appealed. The Court of Appeals, Simpson, Circuit Judge, held that the complaint was sufficient to state a claim, that application of the doctrine of federal abstention from interference in matters of prison administration was improper and that the prisoner was collaterally estopped from litigating the issue of negligence of the prison officials where determination of issue of negligence was essential to determination of state litigation, the civil rights violation claim was premised upon allegation that the prison officials were grossly negligent in failing to protect him from being stabbed by another inmate and the state court found no negligence on part of prison officials.

Vacated and remanded with directions.

Synopses, Syllabi and Key Number Classification
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488-F 2d 553

1. Courts ⇐406.1(11)

Court of Appeals is not bound by the label which the district court attached to its action and would treat as a dismissal what the district court labeled as summary judgment. U.S.C.A.Const. Amends. 8, 14; Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

2. Civil Rights ⇐13.12(6)

State prisoner's complaint was sufficient to state claim against prison officials under the Civil Rights Act for violation of Eighth Amendment rights arising from negligence of the prison officials in failing to protect prisoner from attack by fellow inmates. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 8; Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

3. Prisons ⇐4

While federal courts are usually reluctant to interfere in matters of state prison administration, they are not unwilling in all situations to review the actions of state prison administrators to determine the existence of possible violations of constitutional rights. 42 U.S.C.A. § 1983.

4. Courts ⇐260.4

District court improperly dismissed state prisoner's civil rights suit against prison officials on basis of doctrine of federal abstention from interference in matters of prison administration. 42 U.S.C.A. § 1983.

5. Judgment ⇐725(1)

A fact decided in earlier suit is conclusively established between parties to such suit and their privies, provided it was necessary to the result in first suit.

6. Judgment ⇐828(3.49)

Where determination of question of negligence was fundamental issue in state prisoner's state court litigation against prison officials, and prisoner's civil rights violation claim was premised upon his allegation that the officials were grossly negligent in failing to protect him from being stabbed by fellow inmate, state court determination that the officials did

not have the foreknowledge essential to a finding of their negligence collaterally estopped prisoner from litigating the question of negligence as a prerequisite to recovery in his federal civil rights action. 28 U.S.C.A. §§ 1331, 1343; 42 U.S.C.A. §§ 1981, 1983 et seq.; U.S.C.A.Const. Amends. 8, 14

Appeal from the United States District for the Eastern District of Louisiana.

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

George O. Parker, the plaintiff below appeals from the entry of what was styled below as a summary judgment in favor of the appellees, McKeithen and others. Decision was withheld to await the result of other litigation and the appeal is now ripe for our decision. In our view, the order entered below amounted to a dismissal for failure to state a claim, an erroneous disposition. Since summary judgment is now a proper disposition, we vacate the original judgment below and remand for the entry of summary judgment upon new and independent grounds.

The suit by Parker was based on injuries received by him while an inmate of the Louisiana State Penitentiary at Angola, Louisiana. Named as defendants were the state and numerous Louisiana State officials ranging from Governor McKeithen to the Warden at Angola.[1] Suit for damages in

1. The named defendants were: John J. McKeithen, Governor of the State of Louisiana. C. C Aycock, Lt. Governor of the State of Louisiana, and President Pro Tempore of the Louisiana Senate; John S. Garrett, Speaker of the Louisiana House of Representatives, the State of Louisiana, through the State Board and/or Department of Corrections; Louis M. Sowers, Director of the Louisiana Department of Corrections; C. Murray Henderson, Warden of the Louisiana State Penitentiary at Angola, Louisiana; Lloyd W Hoyle, Assistant Warden of the Louisiana State Penitentiary at Angola, Hayden J. Dees, Deputy Warden of the Louisiana State Penitentiary

excess of one million dollars was brought under the federal civil rights, Title 42 U.S.C. Secs. 1981 and 1983 et seq., with jurisdiction claimed under Title 28 U.S.C. Secs. 1331 and 1343. The complaint charged that due to the gross negligence of the prison officials acting under color of state statutes, usages and customs, Parker was deprived of his Eighth Amendment right to be free from cruel and unusual punishment[2] and his Fourteenth Amendment right to equal protection of the laws.

The underlying facts are as follows.[3] On September 15, 1969, the date of his injury, Parker was a medium security inmate in Camp H of the Louisiana State Penitentiary at Angola. Counting time allowed for good behavior, Parker was due to be released from Angola less than a week later, September 21, 1969. On the morning of September 15th, inmate Willie Edmonson, also billeted in Camp H, made his way from the second floor of the building in which he and Parker were domiciled to Parker's bed on the first floor. Parker was asleep. Edmonson stabbed Parker in the abdomen several times with a homemade knife, inflicting serious injuries. Parker was hospitalized at the Earl K. Long Hospital at Baton Rouge for two months.

at Angola; The Hartford Accident and Indemnity Insurance Company, insurer of Louis M. Sowers, Hayden J. Dees, and Lloyd W. Hoyle; and Fireman's Fund Insurance Company, insurer of C. Murray Henderson and Willie Edmonson (the inmate who physically attacked Parker causing the injuries of which he here complains).

2. Made expressly applicable to the states through the Due Process Clause of the Fourteenth Amendment by Robinson v. California, 1962, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 which cited dictum from an earlier Supreme Court case originating in the courts of Louisiana, State of Louisiana ex rel. Francis v. Resweber, 1947, 329 U.S. 459, 463, 67 S.Ct. 374, 376, 91 L.Ed. 422, 426.

3. The district court's opinion and the appellate briefs contain only sparse factual recitals. For this reason we have relied in part upon the Stipulation of Facts cited by the Louisiana Court of Appeals in Parker v. State, La.App.1972, 261 So.2d 364, 366-367, aff'd, La.1973, 282 So.2d 483, petition for cert. denied, — U.S. —, 94 S.Ct. —, 38 L.Ed.2d — (1973), a suit arising out of the same injury as the instant suit filed in the state district court on July 20, 1970, some two months prior to the filing of suit in the court below.

The original complaint below alleged that Parker's stabbing by Edmonson was the result of gross negligence on the part of prison officials in that: (1) the officials were aware that inmates at Angola—and Edmonson in particular—made and were regularly in possession of various types of weapons, including knives similar to the one used by Edmonson on Parker, but failed to conduct inspections therefor and failed to maintain protective safeguards to prevent their manufacture; (2) prison officials were aware that Edmonson was a violent person with a record of prior attacks on fellow inmates; (3) prison officials were aware that Edmonson had made specific threats against Parker shortly before the date of the attack; and (4) prison officials had refused to isolate Parker from Edmonson and other inmates but permitted him to remain in an open type dormitory.

Defendants moved for summary judgment alleging that Parker had not presented a substantial federal claim and pointing out that he had filed a suit identical in all respects save the allegations of violations of federal law in Louisiana state court. Following a hearing on the motion, summary judgment was granted as to all defendants, written reasons therefor being assigned by opinion-order.

The district court granted summary judgment in favor of the Governor McKeithen, C. C. Aycock, President Pro Tempore of the state senate and Lieutenant Governor, and John S. Garrett, Speaker of the House of Representatives on the ground of their immunity from suit for acts or omissions done within the sphere of legitimate executive or legislative activities.[4] As to the Warden, Henderson, the Assistant Warden, Hoyle, and the Deputy Warden, Dees, the district judge asserted that, although since Monroe v. Pape, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, courts have differed as to

4. Citing the following cases: Tenney v. Brandhove, 1951, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; Martone v. McKeithen, 5 Cir. 1969, 413 F.2d 1373, and Parine v. Levine, E.D.Mich.1967, 274 F.Supp. 268.

whether unintentional negligent conduct under color of state law will support a claim under Sec. 1983, he followed the view that under exceptional circumstances, unintentional conduct by prison officials may support such a claim. However, he continued, Parker had failed to state such a claim because he alleged only "an isolated incident of negligent failure to protect." Additionally, he considered himself bound by a federal "hands off" policy explicated in numerous cited cases,[5] of refusing to review matters of prison administration, "including the discipline, treatment and care of those confined" unless "exercised in such a manner as to constitute clear abuse or caprice upon the part of prison officials", citing Williams v. Field, 9 Cir. 1969, 416 F.2d 483, cert. denied, 1970, 397 U.S. 1016, 90 S.Ct. 1252, 25 L.Ed.2d 431. He found nothing in the record to indicate bad faith or oppressive motive on the part of the defendant prison officials in failing to protect Parker, and hence no violation of Eighth or Fourteenth Amendment rights.

[1] Our review starts with noting that we are not bound by the label which the district court attached to its action. Tuley v. Heyd, 5 Cir. 1973, 482 F.2d 590. As in that case, the district court here erroneously labeled as a summary judgment what was in fact a dismissal, either for failure to state a claim upon which relief could be granted, F.R.Civ.P. Rule 12(b)(6), or alternatively for reasons apparently based on principles of federal-state comity. We treat the district court's order as a dismissal in our analysis.

[2] We consider first the district court's ruling that failure to allege "more than an isolated incident of negligent failure

5. Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964); Hughes v. Noble, 295 F.2d 495 (CA 5–1961); Stiltner v. Rhay, 371 F.2d 420 (CA 9–1967); Snow v. Gladden, 338 F.2d 999 (CA 9–1964); Schack v. State of Florida, 391 F.2d 593 (CA 5–1968); Granville v. Hunt, 411 F.2d 9 (CA 5–1969); Hess v. Blackwell, 409 F.2d 362 (CA 5–1969); Willis v. White, 310 F.Supp. 205 (ED La.1970).

to protect" provided grounds for dismissal under F.R.Civ.P. Rule 12(b)(6). The district court cited no authority for such a test of the sufficiency of a complaint under Sec. 1983, and we know of none. Indeed, there are several cases from this Circuit in which claims under Sec. 1983, alleging violation of Eighth Amendment rights arising from negligence of state officials have been recognized.[6] We hold that a dismissal in the instant case for failure to state a claim under Sec. 1983 was in error, and the judgment of the district court based on those grounds must be vacated.

6. Roberts v. Williams, 5 Cir. 1971, 456 F.2d 819, Whirl v. Kern, 5 Cir. 1969, 407 F.2d 781. On the question of negligent deprivation of Eighth Amendment rights, compare the majority position in *Robinson*, supra, with this writer's special concurrence in that same opinion. With adequate pendent Mississippi tort jurisdiction, I thought it was unnecessary to decide the Eighth Amendment question, as Judge Nichols did for the majority. See further the panel opinion in Anderson v. Nosser, 5 Cir. 1971, 438 F.2d 183 and the opinion, on rehearing en banc, 5 Cir. 1972, 456 F.2d 835; cert. denied 1973, sub nom. Nosser v. Bradley, 1972, 409 U.S. 848, 93 S.Ct. 53, 34 L.Ed 2d 89. The charges as to the Mississippi prison officials involved in *Nosser* were as to intentional, not negligent acts, but the opinion is significant as reflecting the views of all the then active judges of this circuit as to relief upon Eighth Amendment grounds for mistreatment by prison officials. *Nosser* dealt with alleged inhuman treatment accorded civil rights demonstrators arrested in Natchez, Mississippi and transferred to Parchman Penitentiary under a state statute because of overcrowded conditions in the Natchez jail. The panel opinion found that the prison treatment of these arrestees violated the cruel and inhuman punishment provisions of the Eighth Amendment. While Judge Bell's en banc opinion for the majority "pretermitted the question of Eighth Amendment violation" and based its decision on Fourteenth Amendment due process grounds, seven other active judges of the court joined this writer's special concurrence, 456 F.2d at p. 842, making a total of eight active judges, in asserting that "I would decide forthrightly that no violation of Eighth Amendment rights warranting the direction of a verdict as to liability was made out below, and definitely disapprove the panel decision to this effect," with a footnote citation to my special concurrence in Roberts v. Williams, supra. If this position may be taken as approved by a majority of active judges of this court, a claim alleging as here a violation of Eighth Amendment rights resulting from the gross negligence of state prison officials would have at least colorable validity (as the legal equivalent of intentional acts) in considering the propriety of the dismissal below in the instant case.

[3, 4] We next consider the correctness of the district court's action in dismissing the suit on the further basis that federal courts prefer to abstain on grounds of comity from reaching the merits of a challenge to the acts of state prison officials. While it is true that federal courts are usually reluctant to interfere in matters of prison administration, Sostre v. McGinnis, 2 Cir. 1971, 442 F.2d 178, 191, cert. denied, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740, cert. denied, Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254, it can no longer be correctly asserted that the federal courts are unwilling in all situations to review the actions of state prison administrators to determine the existence of possible violations of constitutional rights. Anderson v. Nosser, supra, Roberts v. Williams, supra, Whirl v. Kern, supra. For this reason we disapprove also the action of the district court to the extent that it can be considered a dismissal on abstention grounds.

In trying to determine what disposition is now to be made of this appeal, we note first that the plaintiff-appellant has sought and received a final adjudication of the question of negligence on the part of prison officials in a separate suit maintained in the courts of the State of Louisiana, Parker v. State, 1971, 19th Judicial District Court (June 29, 1972, Nos. 143, 418) aff'd, 1972 La.App., 261 So.2d 364, aff'd 1973, La., 282 So.2d 483, on rehearing, La., 282 So.2d 488, petition for cert. filed 42 U.S.L.W. 3227 (No. 73–597, Oct. 4, 1973). In the state courts the decision was against the plaintiff on the question of negligence. The trial court applied the test earlier established in St. Julian v. State, La.App.1957, 98 So.2d 284, 285, for determining whether prison officials have been negligent in allowing prison inmates to inflict harm upon one another:

> The general rule gathered from the cases is that in order to hold the State or the employees of a state who have charge of a prison liable for injury to one inmate inflicted by another inmate, there must be knowledge on the part of

such officers in charge that such injuries will be inflicted, or good reason to anticipate such, and following that, there must be showing of negligence on the part of these officials in failing to prevent the injury. (Citing cases).

The state trial court found insufficient the plaintiff's evidence that prison officials knew or should have known that Parker was to be stabbed by Edmonson and dismissed plaintiff's suit.

On appeal, the Louisiana Court of Appeals affirmed the trial court. The court of appeals recognized that prison officials had been informed of the threats made by Edmonson against Parker, but noted that such threats were commonplace in the compound in which Parker was an inmate. The court felt compelled to draw a distinction between mere knowledge of the existence of threats and the existence of actual danger of execution of the threat. The court of appeals found that the trial court had not erroneously concluded that Edmonson's threat against Parker was properly treated by prison officials as little more than an idle threat by a temporarily jealous prisoner with homosexual tendencies against a male paramour with like proclivities. Parker was himself known to have violent tendencies since he was serving a prison term for manslaughter in the fatal stabbing of a male paramour. The population of Camp H was composed of similar prisoners and was constantly a source of petty quarrels, jealousies, bickerings and threats of various kinds. The court mentioned other grounds for upholding the decision of the trial court, inter alia, the fact that, upon being apprised of Edmonson's threats, two prison officers made shakedown searches of Edmonson and his bunk area to determine whether Edmonson was in possession of any weapons.

The Louisiana Supreme Court affirmed the decisions below, again citing the test established in St. Julian v. State, supra, as controlling. The Supreme Court found that the prison officials had taken reasonable measures, including the search of Edmonson and the counselling of both prisoners, to prevent

harm to Parker. On rehearing, the Louisiana Supreme Court adhered to its original opinion. 282 So.2d 488.

[5] We must consider, then, the effect, if any, which the litigation of the issue of negligence in the state courts of Louisiana is to have upon the determination of the plaintiff-appellant's negligence-based Sec. 1983 suit in the federal courts. As this court noted in Hyman v. Regenstein, 5 Cir. 1958, 258 F.2d 502, 510, cert. denied sub nom., Hyman v. Continental Illinois National Bank, 1959, 359 U.S. 913, 79 S.Ct. 589, 3 L.Ed.2d 575: "It, of course, is well settled law that a fact decided in an earlier suit is conclusively established between the parties and their privies, provided it was necessary to the result in the first suit." This is merely a statement of the doctrine of collateral estoppel by judgment more fully enunciated by our citation, in Hyman v. Regenstein, supra, to American Jurisprudence, Judgments, Section 371:

> "'It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issues may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. *In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief.* * * *'"[7]

(Emphasis supplied)

7. In applying the doctrine of collateral estoppel by judgment in this case, we are not unmindful of the unsettled nature of the law regarding the respect to be accorded state court rulings in subsequent federal court proceedings. See Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich.L.

We noted further in *Hyman*, supra, the potential dangers inherent in the doctrine of collateral estoppel, e. g., its "loose" application "to subsequent litigation having such a tenuous connection with the original controversy that application of the doctrine would work an injustice." 258 F.2d at 510. Thus we stated a limitation on the applicability of the doctrine:

> "collateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment and it was foreseeable that the fact would be of importance in possible future litigation." Id. at 511.

Applying the doctrine of collateral estoppel to the situation in the instant case, with due regard for its limitations, we think it is clear that determination of the question of negligence was the fundamental issue in the state court litigation. Aside from the question of damages, it was the only issue in the

Rev. 1723, 1734. n1 45 and accompanying text. In particular, there appears to exist some difference of opinion whether state court decisions are to be accorded force in the federal courts under the doctrine of collateral estoppel by judgment or under the provisions of Title 28 U.S.C. Section 1738, an expansion of the "Full Faith and Credit" provision of Article IV of the United States Constitution. Section 1738 states:

> Such Acts, records and judicial proceedings or copies thereof (referring to the States), so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

We intimate no opinion as to the relative merits of one ground over the other, but rely on the doctrine of collateral estoppel because prior precedent in this circuit approves the doctrine. Hyman v. Regenstein, supra, text.

At the same time we note the existence of a distinction between the factual situation in the instant case and that in Hyman v. Regenstein. *Hyman* concerns the effect to be given the decision of a Colorado state court by a Florida federal district court. We are concerned here with the effect to be accorded by a federal district court sitting in Louisiana to decisions of the courts of the State of Louisiana. No reason or rule of policy exists to our knowledge why

state courts. Determination of the issue of negligence was necessary to the judgment in the state court proceedings.

The state district court concluded that Parker had introduced insufficient evidence to show fore-knowledge on the part of prison officials that Parker was to be attacked by Edmonson. Under the test established in St. Julian v. State, supra, a showing of knowledge was the necessary prerequisite to proof of negligence. Thus, failure to prove knowledge is fatal to proof of negligence. Where does this determination leave Parker's federal claim based on Sections 1981 and 1983?

[6] In his complaint below, Parker alleged:

> . . . that the overall circumstances as herein alleged constitute gross negligence on the part of the State of Louisiana, its officials, the defendants, and all those persons associated with said prison and said persons are responsible unto petitioner for any and all injuries sustained while he was assigned and confined to said prison. . . .

This quote manifests that Parker's civil rights violation claim is premised upon his allegation that the defendants were grossly negligent in failing to protect him from being stabbed by Edmonson. If the defendants were not negligent, Parker's Section 1981–1983 claims fail. It is at this juncture that the doctrine of collateral estoppel by judgment assumes control. The factual question of negligence was fully presented to the state courts, and Parker failed to introduce even sufficient evidence to prove the threshold element of knowledge, much less prove that the defendants were negligent. The state court thereupon dismissed Parker's suit with prejudice. We hold that the doctrine of collateral estoppel by judgment operates to prevent Parker from relitigating the issues of negligence in the federal courts. Hyman v. Regenstein, supra. The final decision of the courts of the State of Louisiana that the defendants did not have the fore-knowledge essential

the rule applied in *Regenstein* to out-of-state judgments should not apply with equal force to in-state judgments, and we proceed upon that basis.

to a finding of their negligence estops Parker from litigating the question of negligence as a prerequisite to recovery on his suit under Title Section 1981 and 1983 of Title 42 U.S.C.

Having treated the order of the district court as a dismissal rather than as a granting of summary judgment for the defendants, we vacate that order, and remand to the district court with directions that summary judgment be entered for the defendants[8] on the grounds that the plaintiff is collaterally estopped by the judgment in his suit in state court from raising the essential issue of negligence in the court below.

Vacated and remanded with directions.

8. We do not review the decision below as to the executive and legislative immunity of the Governor, President Pro Tempore of the Senate and Lieutenant Governor, and Speaker of the House of Representatives, we vacate the judgment below in its entirety. The appellant's brief does not address itself specifically to the question of executive immunity. It speaks rather in terms of negligence and of the Governor's responsibility for the acts of prison officials, and argues that the granting of summary judgment motions as to all defendants was improper because the question of negligence remained to be determined.

The appellees' brief, page 12, notes the lack of clarity in appellants' brief, and says, assuming arguendo that the appellant is continuing 'o assert the liability of the governor and the members of the Louisiana legislative bodies for the harm he suffered, that the appellant must fail on the basis of the doctrines of executive and legislative immunity.

We need not enter this thicket, inasmuch as summary judgment is directed to be entered for all defendants under our mandate.

The question of the State of Louisiana's being amenable to suit we likewise leave unanswered in these proceedings. In the state court suit appellant Parker cited House Concurrent Resolution No. 215(17) and (19) of the Regular Session of the 1970 Louisiana Legislature as authorizing that action. Whether that legislative waiver of sovereign immunity is broad enough to permit this federal action to include the State of Louisiana as a defendant is not argued before us by either brief. Once again, we see no need to undertake this perhaps interesting but wholly unnecessary determination. The summary judgment to be entered below is directed to be as to the entire cause of action asserted against any and all defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Jun 25 4 34 PM '71
BENJAMIN W. RICH
CLERK

GEORGE O. PARKER	CIVIL ACTION
VERSUS	NO. 70-2612
JOHN J. McKEITHEN, GOVERNOR OF THE STATE OF LOUISIANA, ET AL	SECTION F

This suit for damages under the Civil Rights Act[1] is before the Court on defendants' Motion for Summary Judgment.

Plaintiff's complaint alleges that on September 15, 1969, while an inmate at the Louisiana State Penitentiary and while asleep in his bunk, he was brutally stabbed three times by another inmate, Willie Edmonson, a mentally deranged person.

Plaintiff's suit is against various Louisiana State officials and prison employees, alleging a deprivation of his rights under the Eighth and Fourteenth Amendments of the United States Constitution.

Plaintiff specifically contends that the defendants in the legislative and executive branches of State government had full knowledge of the conditions existing at the prison and failed to provide adequate measures to protect him from bodily harm.

The governor of a state, as well as state legislators, are immune from suit under the Civil Rights Act for acts or omissions done within the sphere of legitimate executive or legislative activities.[2]

1/ 42 USC 1981 et seq.

2/ Tenney v. Brandhove, 341 US 367, 71 S.Ct. 783 (1951); Hartone v. McKeithen, 413 F2d 1373 (CA 5-1969); Parine v. Levine, 274 FS 268 (DC Mich. 1967).

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Accordingly, it is ordered that the Motion for Summary Judgment of defendants, John J. McKeithen, Governor of the State of Louisiana; C. C. Aycock, President Pro Tempore of the Louisiana Senate and Lieutenant Governor of the State of Louisiana; and John S. Garrett, Speaker of the Louisiana House of Representatives, is granted.

Plaintiff also alleges that C. Murray Henderson, the Warden; Lloyd W. Hoyle, Assistant Warden; and Hayden J. Dees, Deputy Warden, violated his right to equal protection of the laws and freedom from cruel and unusual punishment. Specifically, plaintiff contends that although defendants were aware of the fact that weapons were produced on the prison premises, they, acting under color of State law, failed to provide adequate internal security measures to prevent the manufacture, possession and use of lethal weapons by prison inmates and, further, that although defendants were aware of Edmonson's threats to stab petitioner, they failed to prevent the injuries inflicted.

Petitioner further asserts that he was deprived equal protection by being imprisoned, in a defenseless state, with prison inmates who, to the knowledge of defendants, manufactured, carried, possessed and used deadly weapons.

Under the concept of general tort liability prevailing in Louisiana, in order to hold the employees of a State who have charge of a prison liable for injury to one inmate inflicted by another inmate, there must be knowledge on the part of such officers in charge that such injuries will be inflicted, or good reason to anticipate such and, following that, there must be a showing of negligence on the part of these officials in failing to prevent the injury.[3/]

3/ St. Julian v. State, 98 So2d 284,(La.App. 1st 1957) and cases cited therein.

To be actionable under 42 USC 1983, the acts complained of must be done under color of State law and must amount to a deprivation of a constitutionally protected right; in this case, freedom from the infliction of cruel and unusual punishment and equal protection of the laws.

Since Monroe v. Pape[4]; some courts have held that unintentional conduct does not state a claim under Section 1983[5], while others have indicated that negligent conduct may support a claim under that section.[6]

We are of the opinion that, under exceptional circumstances, unintentional conduct on behalf of prison officials may support a claim.

This is not a disciplinary case, where prison authorities were called upon to preserve order or were justified in exerting necessary force to restrain or punish a prisoner. Rather, it is a case where an inmate was set upon and physically attacked by another inmate who had been permitted, in some manner, to have or gain possession of a dangerous weapon.

In order to be actionable under Section 1983, more than an isolated incident of negligent failure to protect must be alleged.

4/ 365 US 167, 81 S.Ct. 473 (1961).

5/ US ex rel Gittlemacker v. Pa., 281 FS 175 (ED Pa. 1968); Kent v. Prosse, 265 FS 673 (WD Pa.) affd 385 F2d 406 (CA 3-1967).

6/ Huey v. Barlaga, 277 FS 864 (ND Ill. 1967); Kish v. County of Milwaukee, 48 FRD 102 (ED Wis. 1969).

Although one does not lose all his constitutional rights when he enters a prison, the federal courts have consistently adhered to the so-called "hands off" policy in matters of prison administration and have said that the basic responsibility for the control and management of penal institutions, including the discipline, treatment and care of those confined, is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice upon the part of prison officials.7/

There is nothing in the record to indicate that defendants had a bad faith, oppressive motive in failing to protect plaintiff from being attacked by Willie Edmonson. Under these circumstances, we conclude that defendants' failure, in an isolated instance, to protect plaintiff from attack by a fellow inmate did not constitute cruel and unusual punishment; nor was plaintiff deprived of equal protection under the Eighth and Fourteenth Amendments to the U. S. Constitution.8/

Accordingly, it is ordered that the motion for summary judgment of defendants, Louis M. Sowers, Director of the Louisiana Department of Corrections; C. Murray Henderson, Warden; Lloyd W. Hoyle, Assistant Warden; and Hayden J. Dees, Deputy Warden, all of Louisiana State Penitentiary at Angola, Louisiana, is granted.

New Orleans, Louisiana, June 15, 1971.

Frances L. Mitchell
UNITED STATES DISTRICT JUDGE

7/ Cooper v. Pate, 378 US 546, 84 S.Ct. 1733 (1964); Hughes v. Noble, 295 F2d 495 (CA 5-1961); Stiltner v. Rhay, 371 F2d 420, (CA 9-1967); Snow v. Gladden, 338 F2d 999 (CA 9-1964); Schack v. State of Florida, 391 F2d 503 (CA 5-1968); Granville v. Hunt, 411 F2d 9 (CA 5-1969); Hess v. Blackwell, 409 F2d 362 (CA 5-1969); Willis v. White, 310 FS 205 (ED La. 1970).

8/ Williams v. Field, 416 F2d 483 (CA 9-1969), cert. den., 90 S.Ct. 1252, 397 US 1016.

SUPREME COURT, U. S.
73-1872
JUL 13
No. A-1071
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE O. PARKER,

v.

JOHN J. McKEITHEN,
GOVERNOR OF LOUISIANA, ET AL.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT, JOHN J. McKEITHEN, et al

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No. A-1071

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May it please the Court:

Any consideration of the desirability of granting writs of certiorari in this case should start with this court's own pronouncements on the circumstances under which they generally would entertain such writs. Insofar as it relates to decisions from the lower courts of appeal in the Federal system, Rule 19 of the Supreme Court Rules provides, in pertinent part,

> "... (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of Federal law which has not been, but should be, settled by this court; or has decided a Federal

> question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. . . ." (Rule 19. Section 1 b)

The situation most nearly applicable to the instant case is the third one enumerated above, i.e., that the lower court has decided an important question of Federal law which has not been, but should be, settled by this court. The petitioner, however, makes no reference to such provision but rather attempts an emotional plea that he is a derelict and a criminal who has been denied all rights as a citizen to seek an adequate remedy for the wrongs committed upon him.

In the first place, the arguments advanced by petitioner are totally baseless as he has had his complaint considered by every court in the State of Louisiana and the two lower Federal courts. The simple fact that he has lost his case as not being able to establish a right to recover hardly equates to being stripped of civil rights. In the second place, this "important question of Federal law which has not been, but should be, settled by this court" can readily be settled by simply denying the application for certiorari here. Respondent suggests that the procedural method employed by the Fifth Circuit is interesting, yes even important, but not so important as to require full hearing by this court. It was a reasonable, logical, expedient procedural disposition of the case below and can be approved by this court by a denial of writs herein.

Why then should this honorable court "approve" the decision below? Under the authority of *Hyman vs. Regenstein, 258 F.2d 502*, certiorari denied sub nom.; *Hyman vs. Continental Illinois National Bank, 359 US 913, 79 S.Ct. 589, 3 L.Ed.2d 575 (1959)*, the end results on the merits will be identical, as the issue of negligence obviously is the key question to be resolved in the Federal litigation below. Judge Simpson of the Fifth Circuit, after quoting a portion of the original plantiff's claim herein, then stated:

> "this quote manifests that Parker's civil rights violation claim is premised upon his allegation that the defendants were grossly negligent in failing to protect him from being stabbed by Edmonson. If the defendants were not negligent, Parker's Section 1981-1983 claims fail. It is at this juncture that the doctrine of collateral estoppel by judgment assumes control. The factual question of negligence was fully presented to the state courts, and Parker failed to introduce even the sufficient evidence to prove the threshhold element of knowledge, much less prove that the defendants were negligent. The state court thereupon dismissed Parker's suit with prejudice. We hold that the doctine of collateral estoppel by judgment operates to prevent Parker from relitigating the issues of negligence in the Federal courts." (Parker v. McKeithen, 488 F 2d 438, at 449)

As we appreciate the complaint of petitioner herein, he does not complain about the application of the doctrine of collateral estoppel, but rather the reliance of

the Fifth Circuit on matters not officially in its record in accordance with Rule 10a (RAP) and further objects to the initiation of the "motion" on its own rather than the obviously circuitous course of having we, the defendants, file such a motion in the District Court. It is certainly apparent that such a motion would be sustained in the District Court and, if appealed, would be affirmed by the Fifth Circuit. The disposition below, therefore, arrives at the exact same place in the litigation and it is difficult for respondents to see in what way the petitioner has been denied due process.

Additionally, the difficulty presented by petitioner with the allegation that the defendants in the state action and the Federal action are not identical is without merit. In the first place, the true beneficiaries of the decision below to dismiss on the collateral estoppel argument rather than the failure to state a claim under 12(b)(6) are the individual prison officials. Petitioner erroneously concludes that it is improper for Governor McKeithen, Lt. Governor Aycock, and Speaker Garrett to likewise benefit from this decision. This position is erroneous for the simple reason that they do not need the benefit of this decision to be left out of this litigation. The Fifth Circuit held that a dismissal in the instant case for failure to state a claim under Section 1983 was in error and the judgment of the District Court based on *those* grounds must be vacated. As discussed in Footnote 8 to their opinion, they in fact vacate the judgment as to all defendants but comment that they do not review the decision as to executive and legislative immunity. Respondents, therefore, urge that

that dismissal as pertains to those three defendants is still valid, thus it is not appropriate to charge that they are the improper beneficiaries of this decision. In addition, petitioner takes issue with the dismissal below as to the named insurance company defendants. A careful review of the record in these proceedings will reveal that they had been dismissed previously on motions for summary judgment filed by their respective counsel. Fireman's Fund Insurance Company was dismissed on February 17th, 1971, on its motion for summary judgment. And Hartford Accident and Indemnity was dismissed on November 25th, 1970, on its motion for summary judgment. The basis of both of these motions was that there was utterly no insurance covering the type of liability alleged. Both policies pertain to fidelity bonds of the applicable employees. Additionally, Willie Edmonson, the real culprit herein, was never covered by either of the policies and it was totally erroneous to name Hartford Accident and Indemnity as the insurer of Willie Edmonson, a prisoner in Angola. Further, it is not correct to contend that Willie Edmonson should not be dismissed from this suit under the lower disposition. He was never a defendant in the Federal litigation in the first place and, therefore, can hardly be the recipient of an improper dismissal. If the petitioner will review his own pleadings filed herein, he will note that Hartford Accident and Indemnity was named as the insurer of Willie Edmonson and that is the only manner in which Willie Edmonson was named. In point of fact, he was listed to be served with the papers and presumably was served with the pleadings herein but nowhere does the prayer request judg-

ment against Willie Edmonson. It is thus obvious that he was not a defendant in the Federal proceedings.

The only persons that were actually still in the litigation at the time of the Fifth Circuit's opinion were Louis M. Sowers, C. Murray Henderson, Lloyd W. Hoyle, and Hayden J. Dees. It is to these defendants that the benefits of the estoppel theory flows, and properly so. The initial motion filed by defendants was for summary judgment, in which they admitted all of the facts as alleged in the petition but declared they were entitled to the judgment as a matter of law. This is still the posture that they have taken, thus it is incorrect for petitioner in this application to charge that there are still material issues of fact in dispute. That is simply not true. As the Fifth Circuit properly observed, the motion should have been styled and treated as a motion to dismiss for failure to state a claim for which relief could be granted in the Federal courts, on the theory that mere negligent conduct did not amount to a denial of rights under 1983. The respondents do not agree with the disposition of the Fifth Circuit on that question on the merits, but do agree with the restyling of their motion. Reaching that decision then brought the Fifth Circuit to the strange posture of "... trying to determine what disposition is *now* to be made of this appeal ..." (Emphasis added.) *Parker v. McKeithen*, page 41 of petitioner's brief.)

The action taken by the Fifth Circuit was the only reasonable one to take and is completely within

their broad grant of authority to do substantial justice between the parties, to efficiently manage the course of the litigation, and to supervise the lower District Courts. Petitioner really does not question the fact that the District Court would be bound by the Fifth Circuit's decision in this regard. As respondents appreciate their argument, he does not even question the application of the collateral estoppel doctrine to the case at bar. What he questions is his lack of opportunity to be heard in response to a motion initiated by the defendants herein. Well, of course, the defendants have made no such motion only because the petitioner has been appealing the decision throughout and it has yet to become final. He has kept the ball in the air, as it were, so there has been no opportunity for the defendants to make such a motion. Clearly they would do so if the position were different. What due process, then, has the plaintiff been deprived? In Section 4 of his brief he acknowledges on page 30 in Section (d) the correctness of the legal principle applied by the Fifth Circuit but then takes to task their acceptance of "facts." Petitioner charges that these are not facts at all but opinions of fact. Respondents do not understand the term "opinions of fact, arbitrarily adopted by other courts" and thus fail to see the distinction made by petitioner that the Fifth Circuit is permitted to accept facts but not distorted opinions of these facts. We believe what the petitioner is saying is simply that he fails to agree with the legal conclusion reached by all of the state courts in Louisiana and the lower Federal courts on the "facts." This is his right and it is

for that reason he has exercised so many appellate remedies. But disagreeing with the conclusion of appellate courts does not assign to their findings of fact "distorted opinions." Thus, when one reaches through the bramblebush of emotion with which the plantiff brief is charged, one finds that he actually does not take issue with the holding of *Hyman v. Regenstein*, supra, just that the Fifth Circuit applied it without giving the District Court a chance to apply it on due motion of the defendants. It accomplishes nothing to recite to this honorable court that no such motions have been filed by the defendants. We, of course, acknowledge that there has been no ordinary compliance with Rule 56 *at least insofar as these grounds*. There was, of course, original compliance but any motion initiated at this time would amount to the same substance and all facts would *again* be admitted. There is, thus, no issue of material fact, there is nothing new that the petitioner could add in any responsive appearance, and the case was ripe for decision by the Fifth Circuit.

It is submitted that the remedies chosen in the case at bar are within the authority of the Fifth Circuit, whose decision should be upheld by this court's denial of the application for certiorari.

Respectfully submitted,

WILLIAM J. GUSTE, Jr.,
Attorney General.

STANFORD O. BARDWELL, JR.,
Assistant Attorney General.

CERTIFICATE

I, STANFORD O. BARDWELL, Jr., Attorney for the defendants and a member of the bar of the Supreme Court of the United States, hereby certify that on this_____day of July, 1974, I served copies of the foregoing brief in opposition to petition for certiorari upon Mr. Charles R. Maloney and Mr. David L. Morgan, Jr., by mailing a copy thereof postage prepaid to their offices.

Stanford O. Bardwell, Jr.

STANFORD O. BARDWELL, JR.

B-4763, 7-74